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SUPREME COURT OF THE UNITED STATES.

No. 42.

THE BANK OF THE U. STATES, PLAINTIFF IN ERROR,

VERSUS

JOHN O. DUNN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR WASHINGTON, D. C.

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DISTRICT OF COLUMBIA, set.

At a circuit court of the District of Columbia, begun and held in and for the county of Washington, at the city of Washington, on the first Monday of May, being the third day of the same month, in the year of our Lord one thousand eight hundred and thirty, and of the independence of the United States the fifty-fourth, were present,

The Hon. WILLIAM CRANCH, *Chief Judge.*
BUCKNER THRUSTON, and JAMES S. MORSELL, *Asst. Judges.*
TENCH RINGGOLD, Esq., *Marshal.*
WILLIAM BRENT, *Clerk.*

In the record of proceedings of the same court, amongst others are the following, to wit:

BANK OF THE UNITED STATES *versus* JOHN O. DUNN.

Be it remembered, that heretofore, to wit, on the twenty-fourth day of April, in the year of our Lord one thousand eight hundred and twenty-

eight, the said Bank of the United States, by B. L. Lear, Esq., their attorney, prosecuted and sued forth out of the circuit court here the United States' writ of capias ad respondendum, directed to the Marshal of the District of Columbia, in the words and of the tenor following, to wit:

DISTRICT OF COLUMBIA, to wit.

The United States of America to the Marshal of the District of Columbia, greeting:

We command you that you take John O. Dunn, late of Washington county, if he shall be found within the county of Washington, in your said District, and him safely keep, so that you have his body before the circuit court of the District of Columbia, to be held for the county aforesaid at the city of Washington, on the first Monday of May next, to answer unto the President, Directors and Company of the Bank of the United States, in a plea of trespass on the case, and so forth. Hereof fail not at your peril, and have you then and there this writ.

Witness W. Cranch, Esq., Chief Judge of our said court, at the city of Washington, the eighteenth day of January, anno Domini one thousand eight hundred and twenty-eight.

Issued the 24th day of April, 1828.

W. BRENT, *Clerk.*

Lear

And the aforesaid plaintiffs, by their attorney aforesaid, at the time of prosecuting and suing forth the aforesaid writ, declared against the said defendant, in the plea aforesaid, in form following, to wit:

United States' Bank, District of Columbia, Washington County, to wit:

John O. Dunn, late of said county, was attached to answer unto the President, Directors and Company of the Bank of the United States, in a plea of trespass on the case, and so forth.

And whereupon the said plaintiffs, by B. L. Lear, their attorney, complain that whereas heretofore, to wit, on the eleventh day of December, in the year of our Lord eighteen hundred and twenty-seven, at the county aforesaid, one John Scott made his certain note in writing, commonly called a promissory note, bearing date the day and year aforesaid; and thereby, sixty days after the date thereof, promised to pay to the said defendant or order one thousand dollars, for value received, negotiable and payable at the United States' Branch Bank in Washington, meaning thereby the plaintiffs' office of discount and deposite at the county aforesaid; and the said defendant then and there endorsed the said note, according to the custom of merchants, unto Overton Carr; and the said Carr then and there endorsed the same, according to the same custom, unto the said plaintiffs.

And the said plaintiffs aver that afterwards, at the expiration of the time limited by the tenor and effect of the said note for the payment thereof, to wit, on the 12th day of February, in the year 1828, they presented said note for payment at the aforesaid office of discount and deposite, and then and there demanded payment of the same; but the said maker, nor any other person for him, did not then pay, nor has ever since paid the sum of money mentioned in said note, nor any part thereof; of all which premises the said defendant afterwards, to wit, on the 13th day of February, in the year 1828, had notice.

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By reason whereof, and by force of the statute in such case made and provided, the said defendant became liable to pay the said sum of money in the said note mentioned to the said plaintiffs, according to the tenor and effect of the same, and the said endorsement thereon; and being so liable, in consideration thereof, then and there undertook and promised to pay the same to the same plaintiffs, according to the tenor and effect thereof, and the endorsement thereon, whenever afterwards he should be thereto requested.

And whereas the said defendant afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, was indebted unto the said plaintiffs in another sum of one thousand dollars, for the like sum of money by the said plaintiffs to and for the use of the said defendant before that time paid, laid out, and expended, at the special instance and request of the said defendant, and for other money by the said plaintiffs before that time lent and advanced to the said defendant at his special instance and request, and for other money by the said defendant before that time had and received to the use of the said plaintiffs; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, at the same day and year aforesaid, at the county aforesaid, undertook and promised the said plaintiffs to pay them the said last mentioned sum of money when afterwards he should be thereunto required. Yet the said defendant the said several sums of money herein mentioned, or any part thereof, (although often thereto requested, to wit, on the day and year aforesaid, at the county aforesaid, and often afterwards,) has not paid, but the same or any part thereof to pay has hitherto wholly refused, and still does refuse, to the damage of the said plaintiffs in the sum of two thousand dollars; and therefore they bring suit, and so forth.

B. L. LEAR, *for the plaintiffs.*

JOHN DOE, and } *Pledges, &c.*
RICHARD ROE, }

At which mentioned first Monday of May, in the year one thousand eight hundred and twenty-eight, and the day of the return of the foregoing writ, come the said plaintiffs into the circuit court here, by their attorney aforesaid; and the Marshal of the District aforesaid, to whom the said writ in form aforesaid was directed, makes return thereof to the court here, thus endorsed, to wit, "Cepi. T. Ringgold, Marshal:" and the said defendant being called, appears in court here by Robert Beale, Esq., his attorney. And thereupon, on motion of the said plaintiffs by *his* attorney aforesaid, it is ruled by the court here that the said defendant give special bail in the plea aforesaid, or in default thereof to be committed to the custody of the Marshal aforesaid. Whereupon a certain Overton Carr, present here in court in his proper person, and (with the consent of the said plaintiffs by their attorney aforesaid,) undertakes for the said defendant that in case the said plaintiffs shall recover judgment against the said defendant in the plea aforesaid, or that the said defendant shall be therein legally convict, that then the said defendant shall pay the condemnation of the court thereon, or render his body to the custody of the Marshal aforesaid in satisfaction thereof, or that he the said Overton Carr will do the same for him. And thereupon, on motion of the said plaintiffs by their attorney aforesaid, it is ruled by the court here that the said defendant answer to the declaration aforesaid of the said plaintiffs, in the plea aforesaid, or judgment by the court here will be entered against him in default thereof. And the said defendant, by his attorney aforesaid, defends the force and injury when, and so forth, and prays

leave of the court here to imparle until the first Monday of December next, and then to answer to the declaration aforesaid of the said plaintiffs in the plea aforesaid, and to him it is granted: the same day is given to the aforesaid plaintiffs also.

At which said first Monday of December, in the year of our Lord one thousand eight hundred and twenty-eight, to which said day the said defendant had leave to imparle, and then to answer to the declaration aforesaid of the said plaintiffs in the plea aforesaid, come again into court here the said plaintiffs by their attorney aforesaid, as the said defendant by his attorney aforesaid. And the said defendant, by his attorney aforesaid, as before, defends the force and injury when, and so forth, and saith that he did not assume upon himself in manner and form as the aforesaid plaintiffs above against him hath complained, and of this he puts himself upon the country; and the said plaintiffs do in like manner, and so forth. Therefore, let a jury thereon appear before the court here on the first Monday of May next, by whom, &c., and who neither, &c., to recognize, &c., because as well, &c.: the same day is given to the said parties, then and there, and so forth.

At which said first Monday of May, in the year of our Lord one thousand eight hundred and twenty-nine, come again into court here, as well the said plaintiffs by their attorney aforesaid as the said defendant by his attorney aforesaid; and thereupon further process of and upon the premises aforesaid, between the parties aforesaid, by consent of the said parties and their attornies aforesaid, and by order of the court hereon, is further continued until the first Monday of December next.

And now at this day, to wit, the said first Monday of December, in the year of our Lord one thousand eight hundred and twenty-nine, come again into court here as well the said plaintiffs by their attorney aforesaid as the said defendant by his attorney aforesaid. Whereupon, for trying the issue aforesaid, it is ordered by the court here that twelve persons be chosen by ballot from the pannel of petit jurors returned to the court here, according to law, by the Marshal aforesaid. And twelve persons being so chosen and called, come, to wit: Thomas Sandiford, Edward Semmes, Uriah Hyde, Nicholas Callan, Abraham Broome, James Harvey, John D. Clark, Morris Marsh, Anthony Smith, Thomas Jackson, Wesley Stephenson, and John Harry; who being duly empannelled, and sworn to say the truth in the premises, upon their oath do say that the said defendant did not undertake and promise in manner and form as the said plaintiffs within against him have complained. Whereupon the said defendant, by his said attorney, prays judgment against the said plaintiffs, of and upon the verdict aforesaid, by the jurors aforesaid given in form aforesaid. And the said plaintiffs, by their said attorney, say that the court here ought not to proceed to render judgment upon the said verdict; and pray that judgment against them, of and upon the said verdict, by the jurors aforesaid in form aforesaid given, may be staid, and files in court here the following reasons: "1. Because the court erred in permitting the evidence of Overton Carr to go to the jury, to support the defence made by the defendant. 2. Because the verdict was against the evidence in the case." And because the court here are not advised of giving their judgment of and upon the premises, therefore day thereof is given, as well to the said defendant as to the said plaintiffs, before the court here, until the first Monday of May next, to hear their judgment of and upon the premises; for that the court now here are not yet, and so forth.

At which said day, that is to say the first Monday of May, in the year

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eighteen hundred and thirty, come again into court here the parties aforesaid, by their attorneys aforesaid. Whereupon all and singular the premises being seen, and by the court here fully understood, and mature deliberation thereon had, for that it appears to the court here that the said verdict is in nowise insufficient or erroneous, and that the same ought not to be quashed, and that no new trial ought to be had of the issue aforesaid; therefore, it is considered by the court here that the said plaintiffs take nothing by their writ and declaration aforesaid, but be in mercy, &c., for their false clamor; and that the said defendant go thereof without day, &c.; and it is also considered by the court here that the said defendant recover against the said plaintiffs the sum of by the court here unto him the said defendant on his assent adjudged, for his costs and charges by him about his defence in this behalf laid out and expended, and that he have thereof his execution against the said plaintiffs, and so forth.

Memorandum.—Before the jurors aforesaid withdrew from the bar of the court here, the said plaintiffs, by their attorney aforesaid, filed in court here the following bill of exceptions, to wit: The plaintiffs, to sustain the issue on their part in this cause, produced and read in evidence the note on which the suit is brought.

$ 1000. WASHINGTON, *Dec'r 11th*, 1827.

Sixty days after date I promise to pay John O. Dunn, or order, one thousand dollars, for value received, negotiable and payable at the United States' Branch Bank in Washington.

JOHN SCOTT.

On the back of which endorsed—

J. O. DUNN,

OVERTON CARR.

The names of the several parties thereto being admitted to be in their respective hands-writing, and proved by Michael Nourse, a notary public, and a competent witness, that he demanded payment of the same at the bank where it is made payable, on the 12th February, 1828, which was refused, and left a written notice of the nonpayment of it at the residence of the defendant, in the city of Washington, the day after.

Whereupon the defendant offered as a witness Overton Carr, an endorser of said note, who testified that before he endorsed the same he had a conversation with John Scott, the maker, and was informed by him that certain bank stock had been pledged, or was to be pledged, by Roger C. Weightman, as security for the ultimate payment of the said note, and that there would be no risk in endorsing it. That the witness then went into the room of the cashier of the plaintiffs' office of discount and deposite at Washington, and found there the said cashier, and Thomas Swann, the president of the said office, to whom he communicated the conversation with Mr. Scott, and from whom he understood, upon his inquiry, that the names of two endorsers residing in Washington was required upon the said note as a matter of form, and that he would incur no responsibility (or no risk) by endorsing the said note. He does not recollect the conversation in terms, but such was the impression he received from it. That he went immediately to the defendant, and persuaded him to endorse the note, by representing to him that he would incur no responsibility, or no risk, in endorsing it, as the payment was secured by a pledge of stock; and to whom he repeated the conversations with Mr. Scott and said president and cashier.

That no other person was present at the conversation, the terms of which he does not recollect, but that the impression he received from his conversation with the aforesaid president and cashier, and with the said Scott, and which impression he conveyed to the defendant, was, that the endorsers of the said note would not be looked to for payment of it until the security pledged had been first resorted to, but that the said endorsers would be liable, in case of any deficiency of the said security, to supply the same. That neither this witness nor Mr. Dunn were at the time able to pay such a sum, and that both endorsed the note as volunteers, and without any consideration, but under the belief that they incurred no responsibility, (or no risk,) and were only to put their names upon the instrument for form's sake. To which evidence the plaintiffs by their counsel objected, but the court permitted it to go to the jury.

The plaintiffs then offered as a witness Richard Smith, the cashier of their office of discount and deposite aforesaid, who was summoned on the part of the defendant, and who testified that he has no recollection of the conversation mentioned by the said Carr, but that no stock was ever pledged for the payment of the said note. That Roger C. Weightman had given to the said office a guaranty that he would pay the said note in case the parties to the same should fail to do so, after all legal and proper measures had been taken to procure the payment of it by them. That he is certain that nothing was said, either by him, or by the said Thomas Swann in his presence, as to the endorsers not being held liable for the payment of the said note. That it was contrary to the practice of the said office to take endorsers on notes, who were not to be held liable. That the president and himself, conjointly, (nor either of them,) were not authorized to give any such exemption to endorsers, or to determine who should be taken as endorsers on notes. That this was the province of the Board of Directors alone, unless when they appointed a committee of the Board for that purpose. That the guaranty aforesaid was given by the said Weightman after the said note had been made and endorsed.

Mr. Smith, upon cross-examination, having stated that he was a stockholder in the bank, the court rejected his testimony, and instructed the jury that it was not evidence. The plaintiffs' counsel then offered to swear the said Thomas Swann, who had been summoned as a witness on the part of the defendant; but the defendant's counsel objected to his competency for the same reason; which objection the court sustained: to which the said plaintiffs by their counsel except, and also the admission of the testimony of the aforesaid Overton Carr, and the rejection of Richard Smith's testimony; and they pray the court to sign and seal this their bill of exceptions, which is accordingly done, this fifth day of January, one thousand eight hundred and thirty.

W. CRANCH, [SEAL.]
JAMES S. MORSELL, [SEAL.]

And whereas afterwards, to wit, on the seventeenth day of August, in the year one thousand eight hundred and thirty, the said the President, Directors and Company of the Bank of the United States, by B. L. Lear, their attorney aforesaid, produced and filed in court here the writ of the United States for the correcting of errors of and upon the judgment aforesaid, directed to the Judges of the circuit court of the District of Columbia in the county of Washington. And in pursuance thereof, and according to the

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form and effect of the law in such case made and provided, a transcript of the record of proceedings of the judgment aforesaid, and all things thereto relating, with the writ of error aforesaid, and a copy of the appeal bond hereto annexed, is hereby transmitted to the said Supreme Court accordingly.

In testimony whereof, I have hereto subscribed my name and affixed the seal of the said circuit court, this fifteenth day of September, anno Domini one thousand eight hundred and thirty.

WM. BRENT, *Clerk.*

(*Writ of Error.*)

UNITED STATES OF AMERICA, sct.

The President of the United States, to the Judges of the circuit court of the United States for the District of Columbia, sitting for the county of Washington, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between the President, Directors and Company of the Bank of the United States, plaintiffs, and John O. Dunn, defendant, a manifest error hath happened, to the great damage of the said President, Directors and Company of the Bank of the United States, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of January next, in said Supreme Court, to be then and there held; and that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and custom of the United States, should be done.

Witness the honorable John Marshall, Chief Justice of said Supreme Court.

Issued the 13th day of August, 1830.

[SEAL.]

WM. BRENT,
Clerk Circuit Court Dist. Col. County Wash'n.

(*Citation.*)

DISTRICT OF COLUMBIA, sct.

The United States of America to John O. Dunn, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of January next, pursuant to a writ of error filed in the clerk's office of the United States' circuit court of the District of Columbia for the county of Washington, wherein the President, Directors and Company of the Bank of the United States are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said President, Directors and Company of the Bank of the United States, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.